

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS DURELL HOSKINS,

Defendant-Appellant.

UNPUBLISHED
February 18, 2014

No. 313639
Saginaw Circuit Court
LC No. 11-036301-FH

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree home invasion, MCL 750.110a(2), and conspiracy to commit first-degree home invasion, MCL 750.157a. We affirm.

This case arises from a home invasion that took place in Saginaw Township on the morning of July 8, 2011. When Joan Weigl and her son Andrew returned to their home, they found a strange car in their driveway. The car was occupied by Nicholas Lawrence who said he had car trouble. Joan went inside her house and confronted a male and two women, Ertonya Bishop and Tamara Hoskins, who immediately fled with the male driving the unfamiliar car. Andrew identified defendant from a photographic show-up as the male who emerged from the house, and he identified defendant at the preliminary examination as well as at trial. Joan identified defendant at trial. Bishop testified, pursuant to a plea agreement, that she had known defendant for several years as the result of her relationship with his niece, coconspirator Hoskins, and unequivocally identified defendant as the fourth participant. A palm print found inside the home was matched to Hoskins. Lawrence testified that the fourth person involved in the home invasion was not defendant, but a man named “Tay.”

On appeal, defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he was the perpetrator of the home invasion. In a Standard 4 brief, defendant challenges the identification witness testimony, and argues that his arrest was not supported by probable cause, he was denied discovery, the prosecutor committed misconduct, and he was denied the effective assistance of counsel.

I. SUFFICIENCY OF THE EVIDENCE

This Court reviews challenges to the sufficiency of the evidence de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). “We view the evidence in a light

most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt.” *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). “This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). When reviewing a challenge to the sufficiency of the evidence, “[a]ll conflicts of evidence must be resolved in favor of the prosecution.” *Id.*

“Identity is an element of every offense.” *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). “Positive identification by a witness may be sufficient to support a conviction of a crime.” *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). This Court will not invalidate the trier of fact’s determination on the credibility of identification testimony. *Id.*

The testimony identifying defendant as the perpetrator of the home invasion was sufficient for the jury to conclude beyond a reasonable doubt that defendant was one of the perpetrators of the home invasion. Andrew, who observed defendant in the daylight as defendant ran directly toward him from the house, unequivocally identified defendant from a photographic show-up during the police investigation, as well as at the preliminary examination. Although Andrew initially estimated that the offender was younger than defendant, the evidence established that defendant used black hair dye which made him appear much younger. Any incongruities between a witness’ description and the suspect’s actual appearance bear not on the validity of the identification evidence, but on the weight to afford it. *Davis*, 241 Mich App at 705. Further, defendant was identified as the perpetrator by Joan, as well as by coconspirator Bishop. This Court will not invalidate the trier of fact’s determination on the credibility of identification testimony. *Id.* at 700.

In his Standard 4 brief, defendant appears to challenge Andrew’s testimony about identifying defendant in a photographic show-up, claiming that his attorney was not shown the photograph and no such identification occurred. However, this issue was never raised at trial and Andrew’s testimony in this regard was not disputed. Defendant further argues that his arrest was illegal and that it tainted Andrew’s identification testimony. This argument is without evidentiary support and is also without merit. Defendant also challenges Andrew’s testimony on the ground that there were inconsistencies in his testimony. Likewise defendant argues that Joan’s testimony was inconsistent with Bishop’s testimony with regard to what the intruders did when Joan entered her house. However, “argument that there was not sufficient evidence simply because of apparent contradictions in testimony or because of blanket assertions that various witnesses were lying is without merit.” *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007). Defendant also claims that a police witness who had interviewed him lied about, or otherwise falsified, defendant’s statements. Defendant also challenges Bishop’s testimony as self-serving and offered in the hope of a more lenient sentence for her role in the crime. Again, credibility issues are for the jury. See *Kanaan*, 278 Mich App at 619; *Odom*, 276 Mich App at 419. Further, the jury was instructed to carefully examine accomplice testimony and juries are presumed to follow the court’s instructions. See *Ericksen*, 288 Mich App at 197.

In summary, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that defendant committed the crimes.

II. DISCOVERY

Defendant argues that he was denied a fair trial because the prosecution withheld certain discovery that would have enabled the defense more effectively to impeach prosecution witnesses. We disagree.

At the close of trial, defense counsel placed an objection on the record that the defense had not received color photographs of the vehicle the home invaders used. This was the only objection relating to discovery. A trial court's decisions on requests for discovery are reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). However, unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). To prove a *Brady* violation occurred, a defendant must show

(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005), habeas corpus gtd sub nom *Cox v Curtin*, 698 F Supp 2d 918 (WD Mich, 2010).]

Defendant contends that color photographs of the vehicle could have been used to impeach Andrew's testimony regarding the color of the vehicle's interior. Defense counsel stated that he had received black and white copies of some photographs, and that the prosecution had informed the defense that the prosecution had received color photographs only the day before trial began, which caused defense counsel to doubt that any deliberate withholding had taken place. Defense counsel admitted that he did not believe the photographs would change the outcome, and so did not think it "absolutely necessary" that the defense have them. Counsel's statements on the record leave no basis for concluding that the prosecution suppressed favorable evidence which, had it been disclosed, could have resulted in a different outcome.

Defendant further asserts that the prosecution failed to turn over any video or other electronic recordings of his interviews with the police, which would have given the jury a clearer sense of what took place in those interviews. Defendant suggests that this would have been a way to expose any editorial retouching by the police of statements attributed to him. However, defendant stated in his Standard 4 brief that his trial counsel informed him he had received all discovery materials, and nothing in the record suggests that any such recordings existed or had not been turned over to defendant's counsel.

In summary, defendant has not established discovery violations that denied him a fair trial.

III. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor denied him a fair trial through improper commentary and other misconduct. Defendant's claims of misconduct were not preserved by contemporaneous objection therefore our review is for plain error affecting substantial rights. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Defendant argues that the prosecutor committed misconduct when she stated in her opening statement that the investigation of this home invasion "began to mesh with a number of other home invasions and breaking and enterings that were happening in daylight hours in Saginaw Township in that same time period." Defendant argues the statement was not later supported by the evidence. Opening statement is the proper time to state the facts that will be proven at trial. *Ericksen*, 288 Mich App at 200. And, here, a police detective testified that a series of daytime home invasions had occurred in the City and Township of Saginaw. Police witnesses additionally testified that Bishop, Hoskins, and defendant were connected to the pawning of jewelry from other home invasions. A specific pawnshop was identified, and surveillance footage from that store showed a vehicle matching the description of the vehicle used in this home invasion. Accordingly, the prosecutor's statement about other home invasions in the area reasonably anticipated the evidence that was produced at trial.

Defendant also argues that the prosecutor improperly implied during closing argument that defendant stole scrap materials in order to create an alibi. This argument concerns the following commentary:

And so he spends the next two hours, from the time this crime was committed, until this receipt is time stamped, getting some stuff together to say that he can say hey, I was at Rifkin. He wasn't at Rifkin when the crime was committed. He was at Rifkin two hours later. . . . This is basically a guy who went somewhere, don't know where, found himself some scrapable material, some aluminum siding, some copper plumbing. Where do you get that stuff? Hum. Do you think you have it lying around your garage? I don't think you do. . . . What kind of place has that in it? Oh, I'm thinking houses, abandoned ones. . . .

A prosecuting attorney may not "interject issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). During closing arguments, however, a prosecuting attorney may argue the evidence and all reasonable inferences from the evidence. *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). Additionally, prosecutorial comments should be "read as a whole and evaluated in the light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Here, the prosecutor's remarks were made in rebuttal to defendant's production of a receipt from a scrap yard that was time stamped on the date of the home invasion. Because the home invasion occurred at approximately 11 a.m., and the receipt was stamped at 1:43 p.m., it was not unreasonable to suggest that defendant sought to establish an alibi following the interrupted home invasion.

Further, even if the statement was improper, defendant has failed to establish plain error that affected his substantial rights. See *Bennett*, 290 Mich App at 475.

Next, defendant argues that the prosecutor's statement that Bishop's testimony was "valuable and important" constituted improper vouching. "Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, where the jury is faced with a credibility question, the prosecutor is free to argue from the facts in evidence that a witness is worthy of belief. *Dobek*, 274 Mich App at 66. The critical inquiry is whether the prosecuting attorney urged the jury to suspend its own judgment out of deference to the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). Here, defense counsel questioned Bishop regarding her use of medications that could result in confusion or memory loss, and about her plea deal in connection with this home invasion. In response to defendant's challenge to Bishop's credibility, the prosecutor properly argued from the facts in evidence that Bishop was a credible witness. Further, the characterization of Bishop's testimony as "valuable and important" did not imply that the prosecutor had some special knowledge concerning her truthfulness. See *Bahoda*, 448 Mich at 276.

Defendant also argues that the prosecutor improperly vouched for the police and their investigation by stating "we had to do good police work, hard police work, we had to put in all our detectives." Defendant argues that this statement suggested to the jury that the police could do no wrong. We disagree with that characterization. Further, a prosecuting attorney may respond to issues raised by the defense. See *Brown*, 267 Mich App at 152. Here, defense counsel argued that the police had interviewed only defendant and the three others involved in this home invasion, and did not seek further information on "Tay." The prosecutor properly responded to the argument by urging the jury to consider the facts in evidence but in no way urged the jury to suspend its own judgment out of deference to the police. See *Whitfield*, 214 Mich App at 352.

Finally, defendant argues that the prosecutor knowingly allowed the admission of false testimony from Andrew, Bishop, and a police detective. A prosecutor may not knowingly use false testimony to obtain a conviction. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). It appears that defendant is arguing that the testimony of some of the witnesses was inconsistent. However, defendant's claim is insufficient to establish that the witnesses provided false testimony or that the prosecutor knowingly used false testimony. See *id.*

In summary, defendant has not established that prosecutorial misconduct denied him a fair and impartial trial. See *Dobek*, 274 Mich App at 63.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel was ineffective for numerous reasons, including that he failed to file various motions, conduct certain investigations, prevent biased jurors from the jury, effectively refute Andrew's testimony, take issue with the prosecution's position that certain evidence did not exist, or object to certain prosecutorial argument. We disagree. Our

review is limited to errors apparent on the record because a *Ginther* hearing was not held.¹ See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

“In reviewing a defendant’s claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel’s performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel’s defective performance.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel’s poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

A defendant raising a claim of ineffective assistance of counsel must overcome a strong presumption that counsel’s tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Counsel’s decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). To overcome that presumption, a defendant must show that counsel’s failure to prepare for trial resulted in counsel remaining ignorant of substantially beneficial evidence that accordingly did not get presented. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). “Trial counsel is not required to advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant argues that his counsel should have moved to suppress identification evidence and should have requested that the court appoint an expert on identification. With regard to the suppression motion, this argument is substantially the same as defendant’s unpersuasive argument concerning identification discussed above. Again, defendant offers no plausible basis for concluding that Andrew’s identification of him was the result of some improperly suggestive pretrial procedure. Counsel is not ineffective for failing to advocate a meritless position. See *id.* Further, decisions regarding what witnesses to present are matters of trial strategy that we do not second-guess on appeal. *Rockey*, 237 Mich App at 76. And there is nothing in the record to support defendant’s apparent claim that an eyewitness expert would have testified in his favor, even if his counsel would have requested an identification expert; thus, defendant has not established that he was denied a substantial defense. See *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant also argues that his counsel was ineffective because he did not interview certain witnesses or subpoena the medical records of one witness. “Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses.” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant argues that his attorney should have interviewed his son and daughter; however, “the failure to interview witnesses does not itself establish inadequate preparation.” *Caballero*, 184 Mich App at 642. Defendant also argues that his counsel should have

¹ *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

subpoenaed the medical records of Bishop because they would have shown that she abused prescription narcotics. However, defendant has failed to establish the admissibility of that evidence which only indirectly bears on the witness' credibility. Further, we cannot determine on this record whether defendant made such requests and, if so, why his counsel did not proceed. We also cannot conclude that such failures, if any, deprived defendant of a substantial defense.

Defendant also claims that his counsel was ineffective for ignoring his requests to submit to a polygraph examination, but results of polygraph examinations are not admissible as evidence of a defendant's guilt or innocence. *People v Jones*, 468 Mich 345, 347, 351; 662 NW2d 376 (2003). Defendant argues that his counsel was ineffective because he did not use Bishop's written police statements to impeach her inconsistent trial testimony. However, defendant does not describe the alleged inconsistencies and does not describe how any such writings would have directly contradicted Bishop's testimony implicating defendant in this home invasion.

Defendant further argues that his counsel was ineffective for failing to object to certain jury members who may have been biased. Defendant notes that when the trial court asked the potential jurors if any of them had been the victim of a home invasion, three of the jurors affirmatively responded. When the trial court asked them if their experiences would prevent them "in any way" from being objective in the instant case, each answered in the negative. Nevertheless, defendant argues that his counsel should have attempted to remove these potential jurors. However, counsel's decisions relating to the selection of jurors generally involve matters of trial strategy which we decline to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Defendant also has provided no legal authority in support of his argument that such a challenge to a potential juror would have been successful; thus, defendant has failed to establish that his counsel was ineffective in this regard.

Defendant also argues that his counsel should have strenuously objected to the prosecutor's invitation to the jury to think about where defendant obtained scrap materials. However, for the reasons discussed with regard to defendant's prosecutorial misconduct claim in this regard, this argument is without merit. Further, counsel's decision to not make an objection can be sound trial strategy and, in this case, counsel likely did not want the jury focusing on this issue. See *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Defendant also claims that his counsel should have objected to the prosecutor's closing argument to the effect that "[t]hey'll say his fingerprints weren't on the TV. Yeah, but Tamara's were, and she's his relative, and she was one of the ones that everybody agrees was there." However, this argument was not improper because it was supported by the evidence and the prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence. See *Bahoda*, 448 Mich at 282.

In summary, defendant's several arguments on appeal in support of his claim that he was denied the effective assistance of counsel are without merit. See *Rockey*, 237 Mich App at 76.

V. PROBABLE CAUSE TO ARREST OR CHARGE

Next, defendant appears to argue that the evidence was insufficient to arrest him in connection with the instant home invasion. However, defendant was arrested by execution of a felony warrant issued August 11, 2011, and the validity of that warrant was never challenged.

Further, defendant's bindover on the charges following a preliminary examination was never challenged. And defendant was convicted as charged. Accordingly, defendant's apparent challenge to his arrest is without merit.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald